Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

In re:

BARBARA M. STONE, individually and as Trustee for Robert L. Stone, Inc., Defined Benefit Pension Plan, ELIZABETH C. MILLER, VERNIE MILLER, LILLIAN HAZEL, and CONSTANTIN POPA,

Petitioners.

Petition for Writ of Mandamus and Prohibition to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

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August 17, 1993

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I. QUESTION PRESENTED

The sole issue raised by this petition is whether the bankruptcy court, as a non-Article III court, has jurisdiction to adjudicate an action filed as a bankruptcy adversary proceeding that seeks to recover fraudulent monetary transfers and/or preferential payments from a defendant who is not a claimant against the bankrupt estate and who has filed a jury demand.

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PETITION FOR WRIT OF MANDAMUS AND PROHIBITION

IV. JURISDICTIONAL STATEMENT

Jurisdiction in this Court to entertain petitioners' Petition for Writ of Mandamus and Prohibition is predicated on 28 U.S.C. § 1651(a).

V. STATEMENT OF FACTS

On March 31, 1993, Jack Stein, as Chapter 11 Trustee of the Estate of Omni Capital Group, Ltd. ("Trustee"), filed a series of complaints, naming the petitioners as defendants therein, in the United States Bankruptcy Court for the Southern District of Florida, as matters Nos. 93-0310, 93-0311, 93-0312, 93-0313, 93-0335, and 93-0343 (the "adversary proceedings").[1] In those actions, the Trustee is seeking to avoid and recover certain payments alleged to be fraudulent transfers and/or preferential payments.[2]

In response to the Trustee's complaints, petitioners, who are not claimants against the bankrupt's estate, each filed motions styled "Motion to Withdraw Reference and Demand for Jury Trial and Memorandum of Law in Support Thereof" ("motions to withdraw the reference") with the United States District Court for the Southern District of Florida.

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[1] All of the petitioners in this matter are listed in the caption. The remaining parties are: Jack Stein, as Chapter 11 Trustee of the Estate of Omni Capital Group, Ltd.; Circuit Judges R. Lanier Anderson, Joel F. Dubina and Black, of the United States Court of Appeal for the Eleventh Circuit; District Judge Shelby Highsmith of the United States District Court for the Southern District of Florida; and Bankruptcy Judge Robert A. Mark of the United States Bankruptcy Court for the Southern District of Florida.

[2] The Trustee is seeking to recover payments totalling in excess of $1,650,000.00.

Concurrently with the motions to withdraw the reference, certain petitioners also filed in the bankruptcy court a "Motion to Abate and Suspend the Deadlines and Trial Date Set in the Order Setting Trial and Setting Pre-Trial Conference." In the motions to abate, petitioners requested, among other things, that the bankruptcy court abate the adversary proceedings as to trial and adjudication of dispositive motions pending a ruling by the district court on the motions to withdraw the references.

On May 25, 1993, at the conclusion of a hearing, the bankruptcy court entered an order denying the motions to abate as to pretrial matters, including adjudication of dispositive motions. At the same hearing, in the context of a colloquy with the court and the Trustee's counsel concerning scheduling further proceedings, petitioners' counsel advised the court that petitioners would seek leave to appeal, and stay pending appeal, whereupon the court informed petitioners that it had no intention of entertaining such relief and expressly directed petitioners to seek such relief in the district court in the first instance.

Certain petitioners filed in the bankruptcy court a notice of appeal ("notice") and "Motion for Leave to Appeal," pursuant to 28 U.S.C. § 158(a) ("motion for leave to appeal"), seeking appeal of the bankruptcy court's order.

While all of the above motions were pending, on June 17, 1993, the Trustee served upon the petitioners his "Motion for Summary Judgment" in all the preference and fraudulent transfer actions ("motion for summary judgment"). The Trustee's motions for summary judgment are set for hearing on August 18, 1993. The bankruptcy court has indicated that it will decide these potentially dispositive motions despite the petitioners' challenge to its jurisdiction and the pendency of the motions to withdraw the references.

On June 25, 1993, certain petitioners filed with the United States District Court for the Southern District Florida, and served on the Trustee, an Emergency Motion for Stay Pending Appeal ("motion for stay").

On July 23, 1993, Judge Shelby Highsmith of the United States District Court for the Southern District of Florida consolidated matters numbered 93-0313, 93-0335, and 93-0343, but not 93-0310, 93-0311, and 93-0312.[3]

On August 6, 1993, Judge Highsmith entered an order granting petitioners Elizabeth Miller, Vernie Miller, and Lillian Hazel's motion to withdraw reference only as to the trial of any legal causes of action, and affirming the reference in all other respects, including hearing and determination of dispositive motions. The judge further ruled that all remaining motions, including petitioners' motions for leave to appeal and for stay pending appeal, are moot. (A copy of the district court's order is reproduced in the Appendix A hereto).

Petitioners filed their Petition for Writ of Mandamus and Prohibition with the Eleventh Circuit on August 12, 1993, along with an "Emergency Motion for Stay" pending a ruling on their Petition. On August 16, 1993, the Eleventh Circuit, Judges Anderson, Dubina, and Black, denied their petition and their motion for stay. (A copy of the Eleventh Circuit's order is reproduced in the Appendix B hereto).

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[3] The defendants in the consolidated matters are Elizabeth C. Miller, et al., Vernie H. Miller, and Lillian Hazel. The defendants in the remaining matters are Barbara M. Stone and Constantin Popa.

VI. ARGUMENT

Petitioners Barbara M. Stone, individually and as Trustee for the Robert L. Stone, Inc., Defined Benefit Pension Plan, Elizabeth C. Miller, Vernie Miller, Lillian Hazel, and Constantin Popa, pursuant to 28 U.S.C. § 1651(a) and Supreme Court Rule 20, hereby petition this Court to issue a writ of mandamus directing the Honorable Anderson, Dubina, and Black, Judges of the United States Court of Appeals for the Eleventh Circuit, to enter an order directing the Honorable Shelby Highsmith, United States District Court for the Southern District of Florida to withdraw the reference in bankruptcy adversary proceedings Nos. 93-0310, 93-0311, 93-0312, 93-0313, 93-0335, and 93-0343, and a writ of prohibition prohibiting the Honorable Robert A. Mark, Judge of the United States Bankruptcy Court for the Southern District of Florida, from adjudicating those adversary proceedings.

A. The Writ Sought is in Aid of this Court's Appellate Jurisdiction

The relief petitioners seek in this court unquestionably is drastic, authorized only in extraordinary situations. *Sun v. Forrester*, 939 F.2d 924, 926 (11th Cir. 1991), *cert. denied*, 112 S. Ct. 1712 (1992). These writs are "appropriate to remedy a clear usurpation of power or abuse of discretion 'when no other adequate means of obtaining relief is available.' " *Id. See also In re Fink*, 876 F.2d 84, 84, (11th Cir. 1989). More importantly, " '[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Mallard v. United States Dist. Court*

for the S. Dist. of Iowa, 490 U.S. 296, 109 S. Ct. 1814, 1822 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 33 S. Ct. 938, 941 (1943)). As will be demonstrated, this petition meets the standard for the writs to issue.

B. This is an Extraordinary Situation

In the exceptional case, a writ is appropriate when the issue raised is an unresolved question of law. *In re Continental Inv. Corp.*, 637 F.2d 1, 7 (1st Cir. 1980). Significantly, both mandamus and prohibition are proper to protect a constitutional right. *See, e.g., Allegheny Intern. v. Allegheny Ludlum Steel*, 920 F.2d 1127, 1133 (3d Cir. 1990) ("it is 'the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to a trial by jury.' *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 472, 82 S. Ct. 894, 897, 8 L. Ed. 2d 44 (1962).").

This petition arises out of an extraordinary situation in that the underlying issue is an unresolved question of constitutional law—the extent of a non-Article III bankruptcy court's authority to adjudicate fraudulent conveyance and preference claims that are traditionally private-rights disputes. No court has considered the issue so broadly framed. Petitioners urge this Court to examine and synthesize language from its opinions in *Northern Pipeline Construction Co. v. Marathon Pipe Line Company*, 458 U.S. 50, 102 S. Ct. 2858 (1982) (plurality opinion) and *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782 (1989), to conclude that bankruptcy courts have no authority at all to adjudicate these types of claims which involve purely private rights. Therefore, this is an extraordinary situation with consequences extending far beyond the boundaries of these cases.

C. The Bankruptcy Court has Usurped Power

The Constitution assigns the judicial power of the United States only to those judicial officers delineated in Article III. Although Congress may establish non-Article III legislative courts, "[f]irmly established in our historical understanding of the constitutional structure," is that only Article III courts have jurisdiction over those private "matters from their nature subject to 'a suit at common law[.]' " *Northern Pipeline*, 448 U.S. at 70, 102 S. Ct. at 2871 n.25. Indeed, "[p]rivate-rights disputes . . . lie at the core of the historically recognized judicial power." *Id.* at 70, 102 S. Ct. at 2871.

It is not necessary for the purpose of this petition to present an exegesis of all matters that implicate private rights. In *Crowell v. Benson*, 285 U.S. 22, 52 S. Ct. 285 (1932) the Court broadly defined private rights as those involving "the liability of one individual to another under the law as defined." *Id.* at 51, 52 S. Ct. at 292. Here, because the Trustee's adversary proceeding against the petitioners is a claim for the recovery of alleged fraudulent monetary transfers and/or preferential payments to them by the bankrupt, the claim is grounded in the private rights between these individuals. Notably, this Court stated in dicta in *Granfinanciera* that fraudulent conveyance actions are private rights actions.[4]

This Court explained that actions to recover fraudulent conveyances were known at common law, and were con-

[4] Although *Granfinanciera* specifically addressed only fraudulent conveyance actions, the Court's holding has been extended to preference actions as well. *See, e.g., Lagenkamp v. Culp*, 111 S. Ct. 330, 331 (1990) (per curiam); *Gower v. Farmers Home Admin.*, 899 F.2d 1136, 1140 n.9 (11th Cir.), *cert. denied*, 498 U.S. 981 (1990).

ducted before juries. 109 S. Ct. at 2790-91. Moreover, the Court stated that

> There can be little doubt that fraudulent conveyance actions by bankruptcy trustees—suits which we said in *Schoenthal v. Irving Trust Co.* "constitute no part of the proceedings in bankruptcy but concern controversies arising out of it"—are quintessentially suits at common law that more nearly resemble state-law contract claims brought by a bankrupt corporation to augment the bankruptcy estate than they do creditors' hierarchically ordered claims to a pro rata share of the bankruptcy res. They therefore appear matters of private rather than public right.

Id. at 2798 (citations omitted).

Prior to passage of the Bankruptcy Reform Act of 1978, the Court noted, suits to recover fraudulent conveyances and preferences were filed in the federal district courts or in state courts. Although related to bankruptcy proceedings, fraudulent conveyance and preference actions brought by a trustee in bankruptcy were deemed separate, plenary suits. *Id.* at 2794.

The Bankruptcy Amendments and Federal Judgeship Act of 1984, however, designated fraudulent conveyance and preference actions as "core" proceedings which bankruptcy judges may "hear and determine," that is, triable by a non-Article III court sitting without a jury. 28 U.S.C. § 157(b)(2)(F) and (H). But, the *Granfinanciera* Court continued, a fraudulent conveyance action does not lose its common law, private-rights attribute by Congress's simple expedient of denominating it a "core proceeding," stating:

> This purely taxonomic change cannot alter our Seventh Amendment analysis. Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabeling the cause of action to which it

> attaches and placing exclusive jurisdiction in an administrative agency or a specialized court of equity.

Granfinanciera, 109 S. Ct. at 2800. Indeed, in *Northern Pipeline*, the Court emphatically stated that "Congress cannot 'withdraw from [Art. III] judicial cognizance *any* matter which *from its nature*, is the subject of a suit at the common law[.]' " *Northern Pipeline*, 458 U.S. at 69, 102 S. Ct. at 2870 (quoting *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 284 (1856)) (emphasis in original).

Key to the Court's resolution of the issue was that petitioners there, like petitioners here, had made no claim against the bankrupt estate. Without such a claim, the trustee can recover only by a plenary action, brought in federal court ancillary to the bankruptcy proceeding. *Id.* at 2798. Indeed, in *Lagenkamp v. Culp*, 498 U.S. ____, 111 S. Ct. ____, 112 L. Ed. 2d 343 (1990) (per curiam), the Court explained that

> In *Granfinanciera* we recognized that by filing a claim against a bankruptcy estate the creditor triggers the process of "allowance and disallowance of claims," thereby subjecting himself to the court's equitable power. . . . If a party does *not* submit a claim against the bankruptcy estate, however, the trustee can recover allegedly preferential transfers only by filing what amounts to a legal action to recover a monetary transfer. In those circumstances the preference defendant is entitled to a jury trial.

112 L. Ed. 2d at 348 (emphasis in original). *See also Gower v. Farmers Home Admin.*, 899 F.2d 1136, 1140 n.9 (11th Cir. 1990).

Although labeled a "core" proceeding by Congress, the Court instructs that fraudulent transfer actions cannot be disposed of in the same manner as core proceedings, that is, adjudication by the bankruptcy court. Consequently, a

bankruptcy court has authority to adjudicate an adversary proceeding under only two circumstances: when the matter is a "pure" core proceeding under 28 U.S.C. § 157(b), or under the consensual referral provision of 28 U.S.C. § 157(c)(2).[5] *Id.*

Although no court has specifically addressed the precise jurisdictional issues raised here, the Eleventh Circuit, in dicta, has cast serious doubt on the constitutional authority of bankruptcy courts to adjudicate fraudulent transfer and preference claims. Relying on this Court's decisions in *Northern Pipeline* and *Granfinanciera*, the Eleventh Circuit has said:

> ". . . the Court's more recent decision in *Granfinanciera, S.A. v. Nordberg*, ____ U.S. ____, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989), appeared to adopt the analysis of the *Northern Pipeline* plurality, and cast doubt on the constitutionality of the bankruptcy courts' authority, under §157(b), to adjudicate certain "core" proceedings without the parties' consent. *Granfinanciera* held that a defendant who has not submitted a claim against a bankruptcy estate has a Seventh Amendment right to a jury trial in a fraudulent-conveyance action brought by a trustee. The Court also strongly suggested—although it specifically avoided holding—that fraudulent-conveyance and voidable-preference actions under 11 U.S.C.A. §§ 547-548 are "private right" claims which "must be tried under the auspices of an Article III court." 109 S.Ct. at 2796; *See*, generally *Id.* at 2794-98, 2802.

Gower, 899 F.2d at 1140 n.9.

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[5] Section 157(c)(2) provides that "the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 [i.e., a non-core proceeding] to a bankruptcy judge." *See also* Bankruptcy Rule 7012(b) ("In non-core proceedings final orders and judgment shall not be entered on the bankruptcy judge's order except with the express consent of the parties.").

In affirming the bankruptcy court references as to hearing and determining case dispositive motions, the district judge found persuasive the holding of the United States District Court for the Northern District of Alabama in *City Fire Equipment Co., Inc. v. Ansul Fire Protection Wormald U.S., Inc.*, 125 B.R. 645 (N.D. Ala. 1989) (en banc). In that case, also an adversary proceeding to recover preferential transfers, after the defendants filed a jury demand the bankruptcy court recommended withdrawal of the reference, concluding it had no jurisdiction. The district court, however, disagreed, interpreting by implication *Granfinanciera* to mean that bankruptcy courts can hear and determine dispositive motions. *Id.* at 646. "This court concludes that the mere filing of a jury demand does not cause the Bankruptcy Court to lose 'jurisdiction' of the action(s) or mandate that the reference be withdrawn." *Id.* at 649.

Petitioners urge here that the district court below, as well as the circuit court, as demonstrated by its reliance on *City Fire Equip.*, failed to grasp the substance of their argument. Petitioners are not invoking their Seventh Amendment right to a jury trial. They do not argue that by filing a jury demand the bankruptcy court loses jurisdiction. Their argument is that the bankruptcy court has no jurisdiction whatsoever to adjudicate private-rights disputes. The Trustee's action to recover fraudulent and/or preferential transfers is one historically grounded in private rights, constitutionally assigned to Article III courts.

With the template of the foregoing constitutional, decisional, and statutory law laid over the facts of this case, it is clear that the bankruptcy court is without jurisdiction to entertain the Trustee's motion for summary judgment or otherwise adjudicate his fraudulent conveyance and preference claims. Considering that these adversary

proceedings involve adjudication of private rights, each raising a cause of action known at common law, that is the only possible conclusion. Adjudication of private-rights disputes, as these proceedings are, is constitutionally assigned to Article III courts. Congress's classification of the action as a core proceeding does not alter this conclusion. Additionally, petitioners have not consented to proceed in the bankruptcy court, and in fact have sought withdrawal of the references.

The bankruptcy court, therefore, has usurped the judicial power reserved only to Article III courts. The district court's refusal to withdraw the references in their entirety and abate proceedings in the bankruptcy court is nothing more than a relinquishment of its Article III power, and as such, is an abuse of its discretion. The Eleventh Circuit's summary denial of the relief petitioners seek is a further abuse of discretion. Petitioners strongly urge that not only is mandamus appropriate when a court lacks jurisdiction, or exceeds the limits of the jurisdiction that it has, *MGPC, Inc. v. Dept. of Energy*, 673 F.2d 1277, 1284 (Temp. Emer. Ct. App. 1982), but also when it fails properly to exercise its jurisdiction, as both the circuit and district courts have done here.

D. There is No Other Adequate Remedy Available to Petitioners

Petitioners have vigorously pursued every other remedy available to them without success. They filed motions to withdraw the references, but the bankruptcy court proceeded. They filed motions to abate, but the bankruptcy court proceeded. They informed the bankruptcy court they would seek leave to appeal, to which the court responded it would not entertain such relief. They sought leave to appeal to the district court, which has not been granted. And after the bankruptcy court set a date for ruling on

the Trustee's potentially dispositive motion for summary judgment, petitioners filed an emergency motion for stay pending appeal. The court denied that motion. They filed a petition for writ of mandamus and prohibition with the Eleventh Circuit, which also has been denied. In the truest possible sense, this Court is now the court of last resort for petitioners.

If the district court's denial of their motions to withdraw the reference were a final order, petitioners could appeal under 28 U.S.C. § 1291. It is, however, "well-settled that orders granting or denying motions for withdrawal of reference are not final." *Allegheny Intern. v. Allegheny Ludlum Steel*, 920 F.2d 1127, 1131 (3d Cir. 1990) (citing *In re Powelson*, 878 F.2d 976, 979 (7th Cir. 1989) and *In re Kemble*, 776 F.2d 802, 806 (9th Cir. 1985)). *See also In re Barrier*, 776 F.2d 1298, 1299 (5th Cir. 1985). As a result, the writs of mandamus and prohibition are the only remedy available to petitioners. Indeed, as we noted at the outset, " '[t]he traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Mallard v. United States Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 109 S. Ct. 1814, 1822 (quoting *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26, 33 S. Ct. 938, 941 (1943)).

Unless this Court issues the writs petitioners seek, the bankruptcy court could proceed to adjudicate all matters raised in these adversary proceedings. That result does violence to the constitutional assignment of private-rights disputes to Article III courts, the consequences of which extend far beyond the boundaries of these proceedings alone.

VII. CONCLUSION

Based on the foregoing demonstration that this petition arises from an extraordinary situation, that the bankruptcy court has usurped power, that the district and circuit courts have abused their discretion, and that the petitioners have no other remedy available to them, they urge this Court to issue a writ of mandamus directing the United States Court of Appeals for the Eleventh Circuit to enter an order directing the United States District Court for the Southern District of Florida to withdraw the references in bankruptcy adversary proceedings Nos. 93-0310, 93-0311, 93-0312, 93-0313, 93-0335, and 93-0343, and a writ of prohibition prohibiting the Honorable Robert A. Mark, Judge of the United States Bankruptcy Court for the Southern District of Florida, from adjudicating these adversary proceedings.

Respectfully submitted,

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August 17, 1993

APPENDIX A

[Filed August 6, 1993]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JACK STEIN, as Trustee of the Estate of Omni Capital Group, Ltd.,

Plaintiff,

v.

ELIZABETH C. MILLER, et al.,

Defendants.

CASE NO. 93-8305-CIV-HIGHSMITH

JACK STEIN, as Trustee of the Estate of Omni Capital Group, Ltd.,

Plaintiff,

v.

VERNIE H. MILLER,

Defendant.

CASE NO. 93-8306-CIV-HIGHSMITH

JACK STEIN, as Trustee of the Estate of Omni Capital Group, Ltd.,

Plaintiff,

v.

LILLIAN HAZEL,

Defendant.

CASE NO. 93-8307-CIV-HIGHSMITH

ORDER ON PENDING MOTIONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

JACK STEIN, as Trustee of the Estate of Omni Capital Group, Ltd.,

Plaintiff,

v.

ELIZABETH C. MILLER, et al.,

Defendants.

CASE NO. 93-8350-CIV-HIGHSMITH

JACK STEIN, as Trustee of the Estate of Omni Capital Group, Ltd.,

Plaintiff,

v.

VERNIE H. MILLER,

Defendant.

CASE NO. 93-8349-CIV-HIGHSMITH

JACK STEIN, as Trustee of the Estate of Omni Capital Group, Ltd.,

Plaintiff,

v.

LILLIAN HAZEL,

Defendant.

CASE NO. 93-8348-CIV-HIGHSMITH

ORDER ON PENDING MOTIONS
(CONTINUED)

THE SIX ABOVE-STYLED CAUSES came before the Court upon the following motions, which concern proceedings in the Bankruptcy Court in Case No. 92-31633-BKC-RAM, *In Re Omni Capital Group, Ltd.*:

(1) Identical Motions to Withdraw Reference and Demand for Jury Trial, filed as District Court Cases:

No. 93-8305-CIV-HIGHSMITH, *Stein v. E. Miller*;
No. 93-8306-CIV-HIGHSMITH, *Stein v. V. Miller*; and
No. 93-8307-CIV-HIGHSMITH, *Stein v. Hazel.*

(2) Identical Motions for Leave to Appeal, pursuant to 28 U.S.C. § 158(a); and Emergency Motions for Stay Pending Appeal of Order Denying Defendant's Motion to Abate, filed as District Court Cases:

No. 93-8350-CIV-HIGHSMITH, *Stein v. E. Miller*;
No. 93-8349-CIV-HIGHSMITH, *Stein v. V. Miller*; and
No. 93-8348-CIV-HIGHSMITH, *Stein v. Hazel.*

On July 15, 1993, the Court heard argument from counsel on these motions. Counsel have indicated to the Court that the issuance of a ruling on the motions to withdraw reference and demand for jury trial before August 18, 1993 would moot the motions for leave to appeal and the emergency motions for stay. Accordingly, the Court will not address the substance of the motions for leave to appeal and the emergency motions for stay.[1]

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[1] At the time the defendants filed the motions for leave to appeal and the emergency motions for stay, the bankruptcy judge had scheduled a hearing on Plaintiff Jack Stein's motions for summary judgment for July 15, 1993. In the proceedings before this Court, the defendants dispute the bankruptcy court's jurisdiction to entertain such case dispositive motions. The bankruptcy judge, however, has continued the hearing until August 18, 1993. Because the motions to withdraw reference address the issue of the bank-

(Footnote continued on following page)

PROCEDURAL BACKGROUND

Bankruptcy Case No. 92-31633-BKC-RAM, *In Re Omni Capital Group, Ltd.*, is currently pending before Judge Robert A. Mark in the Bankruptcy Court for the Southern District of Florida. Plaintiff Jack Stein is the Trustee of the Omni estate in the bankruptcy proceedings. As trustee, he has brought adversary actions against Defendants Elizabeth C. Miller ("E. Miller"), Vernie H. Miller ("V. Miller"), and Lillian M. Hazel to recover what he alleges are preferential and fraudulent transfers, pursuant to 11 U.S.C. §§ 547 and 548.[2] The defendants have not asserted claims against the bankrupt estate. Moreover, the defendants contest the bankruptcy court's jurisdiction over the legal claims presented in the adversary actions. Each of the defendants, therefore, has demanded a trial by jury and has prayed for an order withdrawing the automatic reference to the bankruptcy court, pursuant to 28 U.S.C. § 157(d), "as to the trial of this adversary proceeding and the adjudication of all dispositive motions so as to substantively as well as procedurally permit [the defendant] a trial by jury before an Article III Court of all causes of action legal in nature." (*See e.g.*, Motion of Defendant

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[1] *continued*
ruptcy court's jurisdiction, the Court's timely disposition of these motions moots the defendants' motions for leave to appeal the bankruptcy judge's decision to entertain the summary judgment motions, and renders non-emergent the motions for stay.

[2] The adversary actions in the Bankruptcy Court are: Case No. 93-0313-BKC-RAM-A, *Stein v. E. Miller, et al.*; Case No. 93-0335-BKC-RAM-A, *Stein v. V. Miller*; and Case No. 93-0343-BKC-RAM-A, *Stein v. Hazel.*

Section 547 prescribes which transfers a bankruptcy trustee may avoid as preferential. 11 U.S.C.A. § 547 (West 1993). Section 548 prescribes which transfers a bankruptcy trustee may avoid as fraudulent. 11 U.S.C.A. § 548 (West 1993).

Elizabeth C. Miller to Withdraw Reference and Demand for Jury Trial, Case No. 93-8305-CIV-HIGHSMITH, D.E. # 1, at 5-6.)[3]

THE DEFENDANTS' RIGHT TO A JURY TRIAL IN THE DISTRICT COURT

Title 28, United States Code, Section 157 classifies actions to determine, avoid, or recover preferences as "core proceedings," which may be heard and determined by bankruptcy judges, subject to appeal to the district court.[4] Nevertheless, defendants in such proceedings, who have not submitted claims against the bankrupt estate, do not lose their Seventh Amendment right to a jury trial as to legal causes of action. *Granfinanciera, S.A. v. Nord-*

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[3] Section 157(d) provides, in pertinent part: "The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown." 28 U.S.C.A. § 157(d) (West 1968 & Supp. 1993).

[4] Section 157 provides, in pertinent part: "Each district court may provide that . . . any or all proceedings . . . arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district." 28 U.S.C.A. § 157(a) (West 1968 & Supp. 1993).

Section 157 further provides that, "Bankruptcy judges may hear and determine . . . all core proceedings . . . arising in a case under title 11 . . . and may enter appropriate orders and judgments subject to review under section 158 of this title." 28 U.S.C.A. § 157(b)(1) (West 1968 & Supp. 1993). "Core proceedings include, but are not limited to . . . proceedings to determine, avoid, or recover fraudulent conveyances." 28 U.S.C.A. § 157(b)(2)(H) (West 1968 & Supp. 1993).

Section 158 provides, in pertinent part: "The district courts of the United States shall have jurisdiction to hear appeals from final judgment, orders, and decrees . . . of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title." 28 U.S.C.A. § 158(a) (West 1968 & Supp. 1993).

berg, 109 S. Ct. 2782, 2802 (1989). In making this determination, the Supreme Court in *Granfinanciera* characterized such actions as "matters of private rather than public right." *Id.* at 2798. Such matters, according to the Supreme Court, "must be adjudicated by an Article III court," and if "the right is legal in nature, then it carries with it the Seventh Amendment's guarantee of a jury trial." *Id.* at 2797. Although this language appears to dictate an Article III forum, the Supreme Court expressly left open the question of whether such jury trials can be conducted by bankruptcy judges, stating:

> We do not decide today whether the current jury trial provision—28 U.S.C. § 1411 (1982 ed. Supp. IV)—permits bankruptcy courts to conduct jury trials in fraudulent conveyance actions like the one respondent initiated. Nor do we express any view as to whether the Seventh Amendment or Article III allows jury trials in such actions to be held before non-Article III bankruptcy judges subject to the oversight provided by the district courts pursuant to the [Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub.L. 98-353, 98 Stat. 333].

Id. at 2802.

The Eleventh Circuit has noted the difficulty of this issue but has not yet addressed it. *See In re Davis*, 899 F.2d 1136, 1140 n.9 (11th Cir.), *cert. denied sub nom. Gower v. Farmers Home Admin.*, 458 U.S. 981 (1990). ("The Court [in *Granfinanciera*] strongly suggested—although it specifically avoided holding—that fraudulent-conveyance and voidable-preference actions under 11 U.S.C.A. §§ 547-548 are 'private-right' claims which 'must be tried under the auspices of an Article III court.' ") The Eleventh Circuit further noted, however, that several courts of appeals had found otherwise. *Id.* Because the issue had not been raised in the case before it, the Eleventh Circuit declined to address it. *Id.*

In the Southern District of Florida, two district judges have addressed motions to withdraw reference in cases similar to the ones before the Court. *See Growers Packing Co. v. Community Bank of Homestead*, 134 B.R. 438, 444 (S.D. Fla. 1991) (Kehoe, J.); *Torcise v. Community Bank of Homestead*, 131 B.R. 503, 508 (S.D. Fla. 1991) (Nesbitt, J.). In *Growers Packing*, Judge Kehoe held that bankruptcy judges lack statutory authority to conduct jury trials as to legal causes of action in such cases, and granted the defendant's motion to withdraw reference. *Growers Packing*, 134 B.R. at 444. Because he found no statutory grant of authority, however, Judge Kehoe "decline[d] to reach the further issue of whether Article III and/or the Seventh Amendment raise constitutional barriers to the Bankruptcy Court's power to conduct jury trials." *Id.* In *Torcise*, Judge Nesbitt avoided a statutory interpretation that would engender constitutional issues by reading the "hear and determine" provision of 28 U.S.C. § 157(d) "to apply to bankruptcy judges only when there is no Seventh Amendment right to a jury trial." *Torcise*, 131 B.R. at 507. Judge Nesbitt, therefore, granted the motion to withdraw reference as to the issues on which the defendant was entitled to a jury trial. *Id.* at 508. Judge Nesbitt concluded:

> If there are any remaining matters which must be adjudicated by the district court after all pre-trial matters, including discovery and pre-trial motions, have been addressed by the bankruptcy court consistent with the full extent of its powers under the 1984 Bankruptcy Amendments and the Constitution, the Court shall place this cause on its trial calendar.

Id.

The Court finds persuasive the reasoning of *Growers Packing* and *Torcise*. Accordingly, the Court concludes that the defendants in these preferential and fraudulent

transfer adversary proceedings are entitled to a trial by jury, before this Court, as to any legal issues that require trial.[5]

THE DEFENDANTS' RIGHT TO HAVE DISPOSITIVE MOTIONS DECIDED BY THE DISTRICT COURT

In their motions to withdraw reference, the defendants further argue that they are entitled to have dispositive motions decided by an Article III judge. Specifically, the defendants claim that Judge Mark lacks jurisdiction to entertain and decide the summary judgment motions that the bankruptcy trustee, Stein, has filed in the adversary proceedings.[6] As stated at oral argument, the defendants' position is that, along with the right to a jury trial, they have an inextricable right to "have an Article III judge determine whether there are issues to be tried." (Transcript of Proceedings, July 15, 1993, at 23-24.) The defendants, therefore, have asked the Court to declare unconstitutional the portion of 28 U.S.C. § 157 which confers jurisdiction upon bankruptcy judges "to hear and determine" preferential and fraudulent conveyance actions, where the defendants have not submitted themselves to the bankruptcy court's jurisdiction. Alternatively, the defendants ask the Court to interpret this provision as only permitting the

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[5] In accordance with the rationale of the *Growers Packing* and *Torcise* opinions, as well as the teaching of *Granfinanciera*, the Court grants the motion to withdraw reference only as to "legal" issues, for which the Seventh Amendment guarantees trial before a jury. Indeed, the defendants have expressly directed their motions to withdraw reference to legal, as opposed to equitable, causes of action.

[6] These motions are presently scheduled for argument before Judge Mark on August 18, 1993.

bankruptcy court to issue a report and recommendation as to case dispositive motions.[7]

The defendants predicate their argument on the Supreme Court's distinction between private and public rights expounded in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) and *Granfinanciera, S.A. v. Nordberg*, 109 S. Ct. 2782, 2802 (1989). As previously noted, language from the *Granfinanciera* opinion, which relies heavily on *Northern Pipeline*, appears to dictate an article III forum for the adjudication of "private right" claims. Such an expansive reading of the *Granfinanciera* opinion, however, cannot be reconciled with the Supreme Court's express abstention from addressing the issue of whether bankruptcy judges may conduct jury trials.

In a well-reasoned opinion, the Northern District of Alabama, sitting en banc, has accurately pointed out that, "Nowhere does the [*Granfinanciera*] case hold that the Bankruptcy Court does not have jurisdiction over these [preference and fraudulent transfer] actions." *City Fire Equip. Co. v. Ansul Fire Protection Wormald U.S., Inc.*, 125 B.R. 645, 646 (N.D. Ala. 1989) (en banc).[8] The Northern District of Alabama concluded that bankruptcy court jurisdiction over such actions extends to the determina-

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[7] In fashioning such a limited reference, the defendants would have the Court import the statutory procedure governing United States Magistrates, 28 U.S.C. § 636, to these adversary bankruptcy actions. The Court, however, need not reach this alternative proposal.

[8] Indeed, such a determination would render moot the question expressly left open by the Supreme Court regarding a bankruptcy court's ability to conduct jury trials in such actions. *City Fire*, 125 B.R. at 646 n.3.

tion of case dispositive motions, and that a defendant's right to jury trial is not jeopardized by having a bankruptcy court "hear and determine" case dispositive motions. *Id.* at 649-50. The Northern District of Alabama stated:

> While motions to dismiss and motions for summary judgment may be dispositive, they do not impact on the right to a *jury* trial. They merely involve legal issues as to whether any trial is necessary. Such motions impact on the right to a *trial* of any type, jury or non-jury. They do not result in the findings of fact, only a determination that findings of fact are unnecessary because of failure to state a claim upon which relief can be granted, lack of disputed facts, etc. The granting of such motions does not deprive a party of a *right* to a *jury* trial.

Id. at 649. The Court finds this reasoning persuasive. Moreover, given the Supreme Court's contemplation of the possibility that bankruptcy judges may conduct jury trials in preference and fraudulent transfer actions, the Court concludes that the defendants' right to a jury trial is not "inextricably bound" to adjudication of case dispositive motions by an article III judge. Like Judge Nesbitt in *Torcise*, therefore, the Court withdraws the bankruptcy reference only for purposes of jury trial, and leaves the reference intact as to all pretrial matters.

CONCLUSION

Based on the foregoing considerations, it is hereby ORDERED AND ADJUDGED that:

(1) Defendant E. Miller's motion to withdraw reference and demand for jury trial, in Case No. 93-8305-CIV-HIGH-SMITH, *Stein v. E. Miller*, is GRANTED IN PART AND DENIED IN PART;

(2) Defendant V. Miller's motion to withdraw reference and demand for jury trial, in Case No. 93-8306-CIV-HIGHSMITH, *Stein v. Miller*, is GRANTED IN PART AND DENIED IN PART;

(3) Defendant Hazel's motion to withdraw reference and demand for jury trial, in Case No. 93-8307-CIV-HIGHSMITH, *Stein v. Hazel*, is GRANTED IN PART AND DENIED IN PART;

(4) The bankruptcy court reference is WITHDRAWN IN PART for these three adversary cases as to the trial of any legal causes of action. The bankruptcy court reference is AFFIRMED in all other respects, including hearing and determination of case dispositive motions. If and when these cases become ready for trial, the Court SHALL PLACE them on its calendar for jury trial promptly upon receipt of such notification from the bankruptcy court.

(5) Defendant E. Miller's motion for leave to appeal, pursuant to 28 U.S.C. § 158(A); and emergency motions for stay pending appeal of order denying defendant's motion to abate, in Case No. 93-8350-CIV-HIGHSMITH, *Stein v. E. Miller*, are DENIED AS MOOT.

(6) Defendant V. Miller's motion for leave to appeal, pursuant to 28 U.S.C. § 158(A); and emergency motions for stay pending appeal of order denying defendant's motion to abate, in Case No. 93-8349-CIV-HIGHSMITH, *Stein v. V. Miller*, are DENIED AS MOOT.

(7) Defendant Hazel's motion for leave to appeal, pursuant to 28 U.S.C. § 158(A); and emergency motions for stay pending appeal of order denying defendant's motion to abate, in Case No. 93-8348-CIV-HIGHSMITH, *Stein v. Hazel*, are DENIED AS MOOT.

(8) Cases No. 93-8305-CIV-HIGHSMITH, *Stein v. E. Miller*; No. 93-8306-CIV-HIGHSMITH, *Stein v. V. Miller*; No. 93-8307-CIV-HIGHSMITH, *Stein v. Hazel*; No. 93-8350-CIV-HIGHSMITH, *Stein v. E. Miller*; No. 93-8349-CIV-HIGHSMITH, *Stein v. V. Miller*; and No. 93-8348-CIV-HIGHSMITH, *Stein v. Hazel* are CLOSED. All pending motions not previously ruled on are DENIED AS MOOT.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 6th day of August, 1993.

/s/ SHELBY HIGHSMITH
SHELBY HIGHSMITH
UNITED STATES DISTRICT JUDGE

cc: Lawrence A. Kellogg, Esq.
Janie Locke Anderson, Esq.

APPENDIX B

[Filed August 16, 1993]

FOR THE ELEVENTH CIRCUIT

No. 93-4863

IN RE: BARBARA M. STONE, individually
and as Trustee for Robert L. Stone, Inc.,
Defined Benefit Pension Plan,
ELIZABETH C. MILLER,
VERNIE MILLER,
LILLIAN HAZEL,
CONSTANTIN POPA,

Petitioners.

On Petition for Writ of Mandamus
to the United States District Court for the
Southern District of Florida

BEFORE: ANDERSON, DUBINA and BLACK,
Circuit Judges.

BY THE COURT:

Petition for writ of mandamus is DENIED. Petition for writ of prohibition is DENIED.

Petitioners' emergency motion for stay pending appeal of the bankruptcy court's hearing scheduled for Wednesday, August 18, 1993, on motions for summary judgment is DENIED.